

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

Assigned on Briefs October 25, 2006

STATE OF TENNESSEE v. EDUARDO RODRIGUEZ

Direct Appeal from the Criminal Court for Wilson County
No. 02-0275 J. O. Bond, Judge

No. M2005-02466-CCA-R3-CD - Filed February 22, 2007

The defendant, Eduardo Rodriguez, was convicted of two counts of rape of a child and two counts of aggravated sexual battery. The aggravated sexual battery convictions were merged into the rape of a child convictions, and the defendant was sentenced to consecutive terms of twenty years for each child rape conviction. On appeal, the defendant argues that the trial court erred (1) in allowing testimony regarding his viewing of pornography on the home computer, and the repeated and compounded error of allowing the state to introduce this evidence was reversible error; (2) in overruling his motions for a mistrial following testimony of other allegations of child molestation; and (3) in ordering consecutive sentencing. Upon review of the record and the parties' briefs, we modify the defendant's sentences to be served concurrently, rather than consecutively. In all other respects, the judgments of the trial court are affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed as Modified

J.C. McLIN, J., delivered the opinion of the court, in which DAVID H. WELLES and NORMA MCGEE OGLE, JJ., joined.

William K. Cather, Assistant Public Defender, Lebanon, Tennessee, for the appellant, Eduardo Rodriguez.

Paul G. Summers, Attorney General and Reporter; Sophia S. Lee, Assistant Attorney General; Tom P. Thompson, Jr., District Attorney General; and Robert N. Hibbett, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

BACKGROUND

On March 12, 2002, the Wilson County grand jury returned a four-count indictment charging the defendant with two counts of rape of a child and two counts of aggravated sexual battery. A jury trial was conducted on July 29, 2003, from which we summarize the following testimony.

Wanda Whited testified that the victims in this case were her grandsons, C.R. and J.Y.¹ In 1998, Ms. Whited's daughter, Tammy Rodriguez, and Ms. Rodriguez's husband, the defendant, lived with Ms. Whited in her home on Tater Peeler Road in Wilson County, Tennessee. Ms. Rodriguez's three children from a prior relationship, Carrie, Crystal, and C.R. also lived in Ms. Whited's home. J.Y., the son of Ms. Whited's oldest child, would stay at Ms. Whited's house on the weekend approximately twice a month. Carrie and Crystal would sometimes stay with their fathers on the weekend. Ms. Whited said that the defendant would babysit the children when Ms. Rodriguez and she had to work on the weekend. Ms. Whited testified that in 1998 she had a computer with internet access. She said that the defendant spent a lot of time on the computer, particularly at night.

On cross-examination, Ms. Whited admitted that when she was initially interviewed in January 2002 regarding the allegations against the defendant she said that she was not aware of anything sexual going on with the children in her home and that the victims had never mentioned that the defendant had treated them inappropriately. Ms. Whited also admitted that she had thought C.R.'s older sister might have coached him to say things against the defendant because "[b]ack then she told a lot of tales," but Ms. Whited "[did not] know about that now."

Crystal Sutton, C.R.'s older sister, testified that she was living with her grandmother in 1998 along with her mother, sister, brother, and the defendant. Crystal stated that there was a computer in the house that she and her mother and the defendant used. Crystal said that the defendant babysat J.Y. and C.R. when her grandmother had to work on the weekend. Crystal acknowledged that the defendant moved out in June 2001 to live with another woman, but he returned in January 2002.

Twelve-year-old J.Y. testified that in 1998 he would visit his grandmother's house on some weekends to play with C.R. and see his grandmother. J.Y. recalled that one weekend he and C.R. were playing video games in C.R.'s room when the defendant came in and asked the boys to come to his room. J.Y. said that they went into the defendant's room and he "had a TV . . . that had naked people on there, and he told us to watch it for a little bit then he went over there and he started touching us on our private areas." He explained that the defendant began by touching his penis over his clothes and then under his clothes. The defendant then "told us to pull down our pants and he touched it with his hands and his mouth, and then he did that for a little bit and then he pulled down his pants and told us to do that to him." Afterwards, the defendant took the boys outside behind a shed and had them smoke a white powder substance on a can. J.Y. said that he did not report the incident right away because he thought it was a game until Carrie told him that it was not a game, that is was bad. J.Y. stated that this was not the only time the defendant molested him – that it happened a couple of other times.

¹ It is the policy of this court not to reveal the names of minor victims of sex crimes.

On cross-examination, J.Y. testified that he told his mother about the incident well before it was reported to the police in January 2002. J.Y. said that he also told his mother that a similar incident had happened on other occasions. J.Y. recalled meeting with a Department of Children's Service (DCS) worker and telling the worker that Carrie had once told him to lie about the defendant. J.Y. did not remember telling the DCS worker that the incident only happened one time. On redirect, J.Y. clarified that the lie Carrie told him to tell was to lie and say that the defendant did not touch him.

Twelve-year-old C.R. testified that one day when his cousin J.Y. was at his house the defendant molested them – “[h]e sucked us and told us to suck him and he touched us.” C.R. clarified that the defendant touched his privates and put his mouth on C.R.'s penis. The defendant had C.R. put his mouth on the defendant's penis. The defendant did the same things to J.Y. C.R. stated that he did not report the incident right away because he was scared and the defendant told him not to tell. The first person C.R. told was his sister Carrie.

On cross-examination, C.R. stated that he told Carrie about the incident later the night after it happened, and then told his mother after Carrie told her which was not right away. C.R. recalled that after the incident, the defendant had him and J.Y. smoke crack with a glass pipe and Pepsi can.

Outside the presence of the jury, Tony York, the defendant's former brother-in-law, testified that he went to Ms. Whited's house to look at her computer and some floppy disks after the defendant moved out the final time. Mr. York discovered that the disks contained pictures of naked adults having sex and photographs of naked ten to thirteen-year-old children. The children were not engaged in any sexual acts.

In front of the jury, Mr. York testified that after the defendant moved out of Ms. Whited's house, Ms. Whited asked him to come to her house and delete some files from her computer. Mr. York found “[p]ornographic pictures on a floppy disk” like one would insert in a computer. The pictures were of adults having sex and nude pictures of girls between the ages of ten to thirteen. Mr. York deleted the pictures. Mr. York acknowledged that he found the disks after the defendant had moved out. The computer was located in the living room of the house.

Wilson County Sheriff's Department Detective Chris Hodge testified that he confiscated the computer from Ms. Whited's home and took it to the Tennessee Bureau of Investigation (TBI) Crime Laboratory. Detective Hodge took the computer approximately five years after the molestation incident in this case. Detective Hodge did not take any floppy disks because he was advised that everything on the disks had been deleted and the disks reused. Detective Hodge interviewed the defendant, and the defendant denied the allegations against him.

The defendant testified that he met his ex-wife, Ms. Rodriguez, at a Hardee's restaurant in Lebanon, Tennessee, and they got married and moved in with Ms. Whited. At the time of the incident, the defendant was working for Ponds by David six days a week. The defendant confirmed that if he was not working on a Saturday and both Ms. Whited and Ms. Rodriguez were working,

then he was responsible for watching the children. The defendant denied ever molesting C.R. or J.Y. In the summer of 2001, the defendant left Ms. Rodriguez and moved in with another woman. The defendant returned to live with Ms. Rodriguez in early 2002, after which the molestation charges arose.

On cross-examination, the defendant stated that he thought J.Y. made the allegations to follow along with C.R. The defendant said he did not know why C.R. would accuse him of the molestation. The defendant admitted that he had pornographic films.

Following the conclusion of the proof, the jury convicted the defendant as charged. The trial court then merged the two aggravated sexual battery convictions into the two rape of a child convictions.

On September 16, 2003, the trial court conducted a sentencing hearing. The pre-sentence report was not filed prior to the hearing, but the defendant waived his right to have the hearing continued. At the hearing, Officer Greg Tekulve, a state probation officer, testified that he completed the pre-sentence report on the defendant. The defendant had one outstanding case for aggravated sexual battery in Rutherford County, and the rest of his criminal history consisted of minor traffic violations. The defendant had no criminal convictions. Officer Tekulve reported no mitigating factors and two enhancement factors – the offense involved more than one victim and the defendant abused a position of private trust.

At the conclusion of Officer Tekulve's testimony, the trial court sentenced the defendant to twenty years on each count of rape of a child and ordered that the sentences be served consecutively. The defendant's total effective sentence was forty years served at 100%.

ANALYSIS

On appeal, the defendant raises three issues for our review: (1) whether the trial court erred in allowing the state's witnesses to testify regarding the defendant's viewing of computer pornography and whether the repeated introduction of this evidence was reversible error; (2) whether the trial court erred in overruling the defendant's two motions for mistrial following the reference to other allegations of child abuse against him; and (3) whether the trial court abused its discretion in ordering that the defendant's sentences be served consecutively.

Computer Pornography

The defendant argues that it was improper for the state to present evidence regarding his viewing of computer pornography and that the repeated introduction of this evidence was reversible error. Prior to trial, the defendant made a motion to exclude evidence of his viewing computer pornography pursuant to Tennessee Rules of Evidence 403, 404, and 608. The trial court held the motion in abeyance until it could hear the challenged testimony at the appropriate point in trial. The trial court heard Tony York's testimony outside the jury's presence, and then, before defense counsel questioned Mr. York, stated:

[Mr. York's testimony is] admissible because one of the children said that the defendant took that child in and showed him videos of adults having sex. This is in corroboration to what the child said. So it's admissible for that purpose. It's corroborative evidence that this did occur, it's part of the act.

....

A computer and porn video like you play on the television are all one and the same now days. You can show them either way. You can show something on a video on a computer the same as you can television. You have a screen. The child has already testified and the child put it into evidence that that's what happened and here comes another witness saying that's what he found on this same computer.

The defendant asserts that Mr. York's testimony regarding the pornographic images he discovered on the floppy disks, as well as Ms. Whited's and Crystal's testimony that the defendant used the computer, and Detective Hodge's testimony concerning his recovery of the computer amounted to prejudicial character evidence.

The Tennessee Rules of Evidence provide that all "relevant evidence is admissible" unless excluded by other evidentiary rules or applicable authority. Tenn. R. Evid. 402. Of course, "[e]vidence which is not relevant is not admissible." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Id.* at 401. However, even relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." *Id.* at 403.

Evidence of a defendant's character offered for the purpose of proving that the defendant acted in conformity with that character is not admissible. *Id.* at 404(a). Additionally, evidence of other crimes, wrongs, or bad acts is not admissible to prove the character of a person to show action in conformity with that character. *Id.* at 404(b). Such evidence may be admissible, however, for "other purposes." *Id.* Our supreme court has determined that such "other purposes" includes demonstrating motive or intent. *State v. Berry*, 141 S.W.3d 549, 582 (Tenn. 2004). A trial court's decision as to the admissibility of evidence will be reversed only upon a showing of abuse of discretion. *See State v. Powers*, 101 S.W.3d 383, 395 (Tenn. 2003); *State v. James*, 81 S.W.3d 751, 759 (Tenn. 2002). When attempting to exclude otherwise admissible and relevant evidence, the individual seeking exclusion bears a "significant burden of persuasion." *James*, 81 S.W.3d at 757-58.

Upon review, we are constrained to note that the introduction of evidence regarding the defendant's viewing of computer pornography is questionable. While the trial court determined that the computer pornography was admissible because it corroborated J.Y.'s testimony that the

defendant showed the boys a video containing naked people, we are hard-pressed to accept the nexus between the pornographic video and the computer pornography.

Ms. Whited, Crystal, and Mr. York all testified that the defendant used the computer. Mr. York testified that he found pictures of adults having sex and pictures of naked underage girls on floppy disks that were viewed on a computer. The computer was located in the living room. This evidence suggests that the defendant viewed pornographic material on the computer.

On the other hand, J.Y.'s testimony was that the defendant showed the boys a video of "naked people" on a television in the defendant's bedroom. While the pornographic video is relevant to show the defendant's intent to seduce J.Y. and C.R., there is no indication that the defendant used the pornographic pictures on the computer for seduction purposes. This court, in *State v. McCary*, 119 S.W.3d 226, 246 (Tenn. Crim. App. 2003), determined that pornographic material was admissible when the victim identified the specific magazines or videos used by the defendant to seduce the victim, but items not identified by the victim were not admissible. Furthermore, the evidence does not support the trial court's conclusion that one can show "something on a video on a computer the same as you can television" when the testimony established that the computer pornography was contained on floppy disks.²

Under these circumstances, we must conclude that the trial court erred in allowing testimony that the defendant viewed pornography on his computer because a jury could infer from such evidence that the defendant had a propensity to commit child rape. Interestingly, in its pretrial argument for admission of the computer pornography evidence, the state said "[the computer pornography] goes to motive and intent to show that he has a thing for children." Again, evidence of a defendant's character is not admissible for the purpose of proving that the defendant acted in conformity with that character, nor is evidence of other crimes, wrongs, or bad acts admissible to prove the character of a person to show action in conformity with that character. Tenn. R. Evid. 404. Such evidence has little probative value and would likely engender substantial prejudice. Therefore, it was error to admit this evidence.

However, not all errors in admitting evidence under Tennessee Rule of Evidence 404 require reversal. The defendant must show that the error probably affected the judgment before reversal is appropriate. *See State v. Moore*, 6 S.W.3d 235, 242 (Tenn. 1999). In assessing whether erroneously admitted testimony caused unfair prejudice to the defendant or was harmless error, this court looks to the "degree . . . by which the proof exceeds the standard required to convict" *Delk v. State*, 590 S.W.2d 435, 442 (Tenn. 1979); *see also Moore*, 6 S.W.3d at 243 (holding evidentiary error harmless where evidence supporting count of child rape was more than sufficient to support verdict of guilty beyond a reasonable doubt). Where proof is more than sufficient to convict, harmless error is appropriate. As noted previously, the jury heard both J.Y. and C.R.'s testimony describing the circumstances and details of the offenses, and by its verdict accredited that testimony. We conclude

² We note that the floppy disks were not introduced into evidence or recovered by the authorities because the graphics were deleted by Tony York.

that the error in admitting evidence regarding the defendant's viewing of computer pornography qualifies as harmless because there was more than sufficient proof of the defendant's guilt.³

Mistrial

The defendant next argues that the trial court erred in denying his two requests for a mistrial after there was reference to other allegations of child abuse against him. The first reference was when J.Y. stated that the defendant molested or raped him a couple other times. After J.Y.'s statement, the defendant moved for a mistrial because "the discovery reports . . . indicated at that time that this was the only time, and today we have one charge here and now we have testimony about alleged other incidents, this testimony is a surprise. It addresses [other] crimes." The trial court denied the motion finding that the defendant could use the testimony during cross-examination but that it did not warrant a mistrial.

The second reference was when Mr. York mentioned other allegations against the defendant involving the defendant's step-daughters. Defense counsel asked Mr. York if C.R. and J.Y. had already made the allegations against the defendant when Mr. York discovered the floppy disks containing the pornographic images. Mr. York responded, "Yeah, with the boys, I don't guess, probably the older girls, you know, said something about it, when that first started. But that's been a long time ago before that happened." The defendant again asked for a mistrial because of the gratuitous information provided by Mr. York. The trial court denied the motion, stating "if you ask the questions you get the answers. You can't choose which ones you want to ask and take them back. You can't do that. You have to know what you're asking."

The determination of whether to grant a mistrial rests within the sound discretion of the trial court. *State v. Smith*, 871 S.W.2d 667, 672 (Tenn. 1994). The reviewing court should not overturn that decision absent an abuse of discretion. *State v. Reid*, 91 S.W.3d 247, 279 (Tenn. 2002). A mistrial is usually appropriate in a criminal case only where there is a "manifest necessity" for such action. *Arnold v. State*, 563 S.W.2d 792, 794 (Tenn. Crim. App. 1977). The purpose for declaring a mistrial is to correct damage done to the judicial process when some event has occurred which prevents an impartial verdict. *Id.* The burden of establishing the necessity for mistrial lies with the party seeking it. *State v. Williams*, 929 S.W.2d 385, 388 (Tenn. Crim. App. 1996).

Upon review, we conclude that the trial court acted properly within its discretion in determining that a mistrial was not warranted. Regarding J.Y.'s statement that "[i]t happened a couple more times," the defendant was given the opportunity to cross-examine J.Y. about his statement and ask whether he had initially said there was only one instance of misconduct by the defendant. Regarding Mr. York's response, we agree with the trial court that the answer was responsive to defense counsel's question; thus, the response was invited by the defendant. As stated in Rule 36(a), Tennessee Rules of Appellate Procedure, relief is not required to be granted to a party

³ The defendant asserts that the error was not harmless because the state "repeatedly" introduced evidence of his viewing of computer pornography. However, the record indicates that Tony York was the only state witness who discussed the actual computer pornography, and the state did not mention computer pornography in its opening or closing arguments.

responsible for an error. See *State v. William John Condy*, No. 104, 1986 WL 12502, at *3 (Tenn. Crim. App., at Jackson, Nov. 5, 1986) (citing *State v. Stapleton*, 638 S.W.2d 850, 857 (Tenn. Crim. App. 1982); *Pulley v. State*, 506 S.W.2d 164 (Tenn. Crim. App. 1973)). The defendant is not entitled to relief on this issue.

Sentencing

The defendant lastly challenges the trial court's imposition of consecutive sentences. Specifically, he argues that, in ordering consecutive sentences, "the only thing the trial court stated with any specificity was the obvious fact that the [defendant] had been convicted of molesting both of the alleged victims in this case."

This court's review of a challenged sentence is a de novo review of the record with a presumption that the trial court's determinations are correct. Tenn. Code Ann. § 40-35-401(d). This presumption of correctness is conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances. *State v. Pettus*, 986 S.W.2d 540, 543-44 (Tenn. 1999). However, if the record shows that the trial court failed to consider the sentencing principles and all relevant facts and circumstances, then review of the challenged sentence is purely de novo without the presumption of correctness. *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). On appeal, the party challenging the sentence imposed by the trial court has the burden of establishing that the sentence is erroneous. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments.

In conducting our de novo review, this court must consider (a) the evidence adduced at trial and the sentencing hearing; (b) the pre-sentence report; (c) the principles of sentencing; (d) the arguments of counsel as to sentencing alternatives; (e) the nature and characteristics of the offense; (f) the enhancement and mitigating factors; and (g) the defendant's potential or lack of potential for rehabilitation or treatment. *Id.* §§ 40-35-103(5), -210(b).

When a defendant is convicted of more than one criminal offense, the trial court may order the sentences to run concurrently or consecutively as guided by Tennessee Code Annotated section 40-35-115. Pursuant to this code section, a trial court may order consecutive sentencing if any of the following criteria are found by a preponderance of the evidence:

- (1) The defendant is a professional criminal who has knowingly devoted such defendant's life to criminal acts as a major source of livelihood;
- (2) The defendant is an offender whose record of criminal activity is extensive;
- (3) The defendant is a dangerous mentally abnormal person so declared by a competent psychiatrist who concludes as a result of an investigation prior to sentencing that the defendant's criminal conduct has been characterized by a pattern of repetitive or compulsive behavior with heedless indifference to consequences;
- (4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;

- (5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor with consideration of the aggravating circumstances arising from the relationship between the defendant and victim or victims, the time span of defendant's undetected sexual activity, the nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims;
- (6) The defendant is sentenced for an offense committed while on probation; or
- (7) The defendant is sentenced for criminal contempt.

Id. § 40-35-115(b).

In sentencing the defendant, the trial court concluded as follows:

Consecutive sentences, the rules that I have to go by, number one would be the defendant is a professional criminal, and he's not. There's no record of that, no prior convictions. His extensive criminal record is none. He has no criminal record, number two. Defendant is a dangerous or mentally abnormal person so declared by a competent psychiatrist. That hasn't occurred. So three is a no. The defendant is a dangerous offender whose behavior indicates little or no regard for human life and has no hesitation about committing a crime in which the risk to human life is high. There's no danger to that from this, that's in the evidence.

But the defendant, number five, the defendant is convicted of two or more statutory offenses involving sexual abuse of a minor, with consideration of the aggravating circumstances arising from a relationship between the defendant and the victim or victims.

The time span of the defendant's undetected sexual activity, nature and scope of the sexual acts and the extent of the residual, physical and mental damage to the victim or victims, or -- and it goes on further, the next one.

He wasn't on probation when this occurred and he wasn't on determinate contempt when this was done. He wasn't on parole when this was done. He was not on escape status when this was done. He wasn't on bail status when this occurred.

The Court . . . knows in this case that he's convicted of two or more statutory offenses involving sexual abuse to a minor. And the Court believes that the aggravating circumstances arises there is sufficient for the Court to run these consecutive. And the Court is going to run the sentences consecutive for an effective forty year sentence.

The defendant asserts that the trial court failed to address the aggravating circumstances, the physical and mental impact on the victims, the time period of his undetected sexual activity, and the nature and scope of the sexual act beyond that inherent in the offense. He maintains that the trial

court essentially sentenced him consecutively based solely on the convicting offense. The state concedes that the trial court failed to elaborate how the facts of the case met the criteria for consecutive sentencing but maintains that the court's conclusion was supported by the evidence.

Here, the trial court recited the statutory language of Tennessee Code Annotated section 40-35-115(b)(5) but failed to articulate its reasoning. Rule 32(c)(1) of the Tennessee Rules of Criminal Procedure requires that the trial court "specify the reasons" behind its imposition of a consecutive sentence. Accordingly, our review is de novo with no presumption of correctness.

After review, we note that the record does not contain evidence of the residual physical or mental impact of the defendant's actions on the victims, nor does the record contain evidence of what made these offenses more aggravated than other child rapes. Also, the time span of undetected activity was very short in that there was no evidence of repeated molestations occurring undetected over a period of time. Although the defendant's actions were clearly reprehensible, the record does not support the imposition of consecutive sentences under Tennessee Code Annotated section 40-35-115(b)(5) or any other provision. Accordingly, we modify the defendant's sentences to be served concurrently, rather than consecutively.

CONCLUSION

Based on the foregoing and the record as a whole, we modify the defendant's sentences to be served concurrently, rather than consecutively. In all other respects, the judgments of the trial court are affirmed.

J.C. McLIN, JUDGE